



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PAUL R. LEPAGE
GOVERNOR

PATRICIA W. AHO
COMMISSIONER

MEMORANDUM

TO: The Board of Environmental Protection

FROM: James R. Beyer, Project Manager and Mark Bergeron, Division Director, Division of Land Resource Regulation, Bureau of Land & Water Quality

RE: Appeal filed by Passadumkeag Wind Park, LLC and Penobscot Forest, LLC of Site Location of Development Act and Natural Resources Protection Act Denial # L-25597-24-A-N and L-25597-TH-B-N for the Passadumkeag Wind Park in the town of Greenbush and the townships of Greenfield, Grand Falls and Summit.

DATE: March 21, 2013

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Statutory and Regulatory References: The applicable statutory and regulatory framework for the issues raised in this appeal are the Site Location of Development Law (Site Law), 38 M.R.S.A. § 484; Site Location of Development Rules, Chapter 375 §§ 14; the Maine Wind Energy Act (WEA), 35-A M.R.S.A. §§ 3451-3455; the Natural Resources Protection Act (NRPA), 38 M.R.S.A. § 480-D; and, the Wetland Protection Rules, Chapter 310. The Site Law Rules interpret and elaborate on the Site Law criteria and the Wetland Rules interpret the NRPA criteria. The Site Law and the NRPA contain standards for existing uses and scenic character for which an applicant must demonstrate a project will not result in an unreasonable adverse effect. The Wind Energy Act sets forth licensing criteria specific to applications filed for permits for expedited wind energy projects.. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2 § 24 (B).

Location: The turbine portion of this project is proposed to be located in Grand Falls Township. The generator lead transmission line is proposed to run along an existing Bangor Hydroelectric Company distribution line along the Greenfield Road in Summit Township, Greenfield Township and the town of Greenbush. The proposed Operation and Maintenance building and an electrical substation are proposed to be located in the town of Greenbush.

Procedural History and Project Description: In Department Order #L-25597-24-A-N and L-245597-TH-B-N, dated November 9, 2012, the Department denied the application for the construction of a 42-megawatt (MW) wind energy development, known as the Passadumkeag Wind Park, based on a finding of an unreasonable adverse effect on the scenic character and the existing uses relating to the scenic resource. The applicant for the project was Passadumkeag Wind Park, LLC. The proposed development consisted of 14 turbines with associated turbine pads, access

roads, electrical collection infrastructure, a meteorological tower, and an Operation and Maintenance building.

The Department held two public meetings, the first on April 25, 2012 at the Greenbush Town Office and the second on July 12, 2012 at the Helen S. Dunn School in Greenbush. The Department denied the applications on November 9, 2012. A timely appeal to the Board was filed on December 10, 2012 by the two appellants listed above. Alexander and Rhonda Cuprak filed a timely response to the appeal on January 7, 2013.

Environmental Issues and Discussion:

1. SCENIC CHARACTER ISSUES RAISED IN APPEAL:

The appellants assert that the Department erred in its finding that the project would have an unreasonable adverse effect on the scenic character, existing uses related to scenic character, or other existing uses in the area based on the following contentions:

- (A) The project would not result in an unreasonable adverse effect on Saponac Pond; and
 - (B) The Department did not apply the correct scenic impact standard from the WEA, but rather applied a standard that merged the WEA scenic impact standard with the Site Law scenic standard applicable to non-wind projects.
- A. The appellants argue that, based on the evidence in the record, the Department should not have found the project would cause an unreasonable adverse effect on Saponac Pond. The appellants contend that because their visual consultant and the Department's visual consultant for the project both stated that the project would not cause an unreasonable adverse effect on the scenic character of Saponac Pond, the Department erred when it reached a different conclusion.

While the evidence submitted by experts is generally given weight, it is solely the Department's role to make the ultimate legal conclusion of whether the expected impacts would be unreasonable, based on all of the evidence in the record and its interpretation of the statutory criteria. While the two consultants each reached an opinion on the ultimate question of applying the law to the facts which was before the Department, in addition to their conclusions, the Department considered the information and their findings on which they based their conclusions.

As described in the Department Order and the draft Board Order, the Department's determination that the project would cause an unreasonable adverse effect to the scenic impact on Saponac Pond was based on its thorough and careful review of the totality of the evidence in the record, including the underlying information in the the analysis of both the applicant's consultant and the Department's consultant, a visual impact assessment conducted by applicant, a peer view by the Department's scenic consultant,

two site visits made by Department staff, and evidence submitted by the public, all in light of the Department's interpretation of the applicable laws.

- B. The appellants also contend that the Department applied the incorrect standard when evaluating the visual impacts of the project to the scenic character of Saponac Pond, by utilizing the standard in the Site Law which includes a requirement that a project fit harmoniously into the surrounding environment. Passadumkeag Wind Park, LLC also contends that the Department should not have required the turbine portion of the proposed project to meet the NRPA standards.

As described in the draft Board Order, the Department determined that it erred in requiring that the applicant make adequate provision for fitting the development harmoniously into the natural environment, and recommends that the Board modify that finding. However, the Department's conclusion that the proposed development would have an unreasonable adverse effect on the existing uses and scenic character of Saponac Pond is an appropriate application of the Site Law, and is fully consistent with the Wind Energy Act.

The appellants further argue that the Department improperly based its conclusion that the project would have an unreasonable adverse impact on the turbines' high visibility.

The Department's order is clear that the determination of an unreasonable adverse effect on the scenic character of Saponac Pond was not based solely on a finding that the generating facilities are a highly visible feature in the landscape.

The Department recommends that the Board concludes that the WEA allows the consideration of whether generating facilities would be a highly visible feature in the landscape as long as such a factor was not the only factor to be the basis for a negative finding with regard to scenic impacts.

The Department recommends that the Board find that:

- 1) The Department erred in requiring that the applicant make adequate provision for fitting the development harmoniously into the natural environment, and recommends that the Board modify that finding;
- 2) The Department's application of the Wind Energy Act standards to assess whether the other required licensing standard of the Site Law pertaining to existing uses and scenic character and the existing uses standard of the Natural Resources Protection Act were met was otherwise correct; and
- 3) The proposed project would have an unreasonable adverse effect on the scenic character of Saponac Pond and the existing uses related to scenic character on Saponac Pond.

2. PROCEDURAL ARGUMENTS RAISED IN APPEAL:

The appellants claim that the Department created a new visual standard after the July 12, 2012 public meeting and that this new standard was created without the knowledge of the appellants, denying them of due process.

As discussed in the draft Board Order, the Department recommends that the Board find the processing of the application was consistent with the Department's rules and a previously adopted policy, and that the procedure followed accorded due process to both appellants.

3. RESPONSE TO THE APPEALS FILED BY ALEXANDER AND RHONDA CUPRAK:

On January 7, 2013, the Cupraks filed a response to the appeals. The Cupraks were interested persons in the licensing process. In their response, they contend that the Department should not have considered the project under the Wind Energy Act and that it should not have been considered an expedited wind energy project. They argue that because the electricity that would have been generated by the project was to be sold to an out-of-state utility that the project would not benefit the citizens of the State of Maine. They raised the same arguments during the licensing process.

4. STANDING:

Passadumkeag Wind Park, LLC is the applicant and has standing to appeal the Department's denial. Penobscot Forest, LLC contends that it is an aggrieved person because it owns the land on which the project is proposed to be built and denial of the project would result in a loss of revenue that it would have gained from an easement with the applicant.

The Department recommends that the Board find that the appellants have demonstrated they are aggrieved persons for the purpose of this appeal, as defined in Chapter 2 § 1(B) of the Department's Rules Concerning the Processing of Applications and Other Administrative Matters.

Department Recommendations: The Department recommends that the Board modify the Department's finding that the project must fit harmoniously into the natural environment; deny the appellants' appeal;

- 1) Conclude that the proposed project would result in an unreasonable adverse effect on the scenic character of Saponac Pond;
- 2) The project would result in an unreasonable adverse effect on existing uses related to scenic character on Saponac Pond; and
- 3) Affirm the Department's decision to deny the proposed wind energy development in Department Order # L-25597-24-A-N and L-25597-TH-B-N.

Estimated Time of Presentation: 3 hours

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Staff Recommendation / Draft Board Order



STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

BOARD ORDER

IN THE MATTER OF

| | |
|--------------------------------------|------------------------------------|
| PASSADUMKEAG WIND PARK, LLC |) SITE LOCATION OF DEVELOPMENT ACT |
| Greenbush, Grand Falls Township, |) NATURAL RESOURCES PROTECTION ACT |
| Summit Mountain Township, Greenfield |) WATER QUALITY CERTIFICATION |
| Township |) |
| Penobscot County |) |
| PASSADUMKEAG WIND PARK |) APPEAL |
| L-25597-24-A-N (denial of appeal) |) |
| L-25597-TH-B-N (denial of appeal) |) FINDINGS OF FACT AND ORDER |

Pursuant to the provisions of 38 M.R.S. §§ 341-D (4) and 344 (2-A) and Chapter 2, § 24 (B) of the Department of Environmental Protection's (Department) regulations, the Board of Environmental Protection (Board) has considered the appeals of Passadumkeag Wind Park, LLC (Passadumkeag Wind) and Penobscot Forest, LLC, (Penobscot Forest) (collectively Appellants) their supportive data, the response filed by Alexander and Rhonda Cuprak (the Cupraks), and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On February 3, 2012, Passadumkeag Wind Park filed a Site Location of Development Act (Site Law) application and a Natural Resources Protection Act (NRPA) application with the Department for the construction of a 42-megawatt (MW), fourteen turbine wind energy development, known as Passadumkeag Wind Park. The development was proposed to be constructed in the town of Greenbush, and in Summit Mountain Township, Greenfield Township and Grand Falls Township. In addition to fourteen 3.0 MW turbines, the project would include an operations and maintenance (O&M) building as well as associated facilities. The turbines would be located in Grand Falls Township. The O&M building would be located in the town of Greenbush. The proposed overall project would include 21.47 acres of impervious area and 97.38 acres of developed area. The applicant's proposal also included the conversion of 1.22 acres of forested wetland to scrub-shrub wetland, and the alteration of 9,800 square feet of moderate value inland waterfowl and wading bird habitat.

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On April 25, 2012, the Department held the first of two public meetings in Greenbush to receive comment on the proposed project. A second public meeting, chaired by the Department's Commissioner, was held on July 12, 2012.

A draft order was issued on November 1, 2012 for public comment. Comments on the draft order were received from the applicant on November 8, 2013. Several interested persons also submitted comments of the draft decision prior the deadline.

The Department denied the Site Law and NRPA applications in Order #L-25597-24-A-N/L-25597-TH-B-N, dated November 9, 2012. Timely appeals to the Board were filed on December 10, 2012 by the two appellants listed above.¹ On January 7, 2013, the Cupraks filed a timely response to the appeal.

2. STANDING:

In the applicant's appeal, Passadumkeag Wind states that it qualifies as an aggrieved person, as defined in Chapter 2, § 1(B) of the Department's Rules, because its Site Law and NRPA applications to develop the wind energy project were denied.

In its appeal, Penobscot Forest states that it is an aggrieved person, contending that the denial of the Passadumkeag Wind application will result in a loss of revenue that it would have gained from an easement with the applicant; a loss of its property rights; and it will impede development of other anticipated wind energy projects on Penobscot Forest lands.

The Board finds that both appellants, Passadumkeag Wind and Penobscot Forest, are aggrieved persons as defined in Chapter 2, § 1(B) and may bring these appeals before the Board.

3. RESPONSE TO THE APPEAL FILED BY ALEXANDER AND RHONDA CUPRAK:

In a letter dated January 7, 2013, the Cupraks argue that the Department should not have considered the project eligible for permitting as an Expedited Wind Energy project as defined in the Wind Energy Act (WEA) because:

- A. The proposed development does not qualify for the expedited wind energy process because the power would be sold to an out-state utility and, therefore, the applicant could not claim the emissions or energy benefits described in the WEA.
- B. The Department must interpret the energy and emissions related benefits as a rebuttable presumption.
- C. The Department must deny the project because the proposed development fails to meet the energy and emissions related benefits in the WEA.

¹ The Penobscot Forest appeal included nine exhibits, six of which are reproductions of documents in the record. Exhibits 1, 2 and 3 were disallowed by the Board Chair on the basis that they could have been provided while the application was pending before the Department.

4. BASIS FOR APPEAL:

The appellants object to the Department's findings and conclusions as follows:

- A. Department Applied Incorrect Standard: The appellants contend that the Department did not apply the correct scenic impact standard from the WEA, but rather applied a standard that merged the WEA scenic impact standard with the Site Law scenic standard applicable to non-wind projects.
- B. Scenic Character Finding: The appellants contend that the Department erred in its findings and conclusion that the proposed project would have an unreasonable adverse effect on the scenic character of Scenic Resources of State or National Significance (SRSNS) or related existing uses.

The Board finds that the two appellants' appeals make similar arguments; therefore the Board will review the two appeals concurrently.

5. REMEDY REQUESTED:

Both appellants request that the Board reverse the November 9, 2012 Department decision denying the application filed by Passadumkeag Wind, and approve the license for the proposed Passadumkeag Wind Park in the Town of Greenbush and the Townships of Grand Falls, Summit Mountain, and Greenfield.

6. DISCUSSION AND FINDINGS:

A. VISUAL IMPACTS TO SAPONAC POND:

The appellants object to the Department's findings and conclusions that the proposed project would have an unreasonable adverse effect on the scenic character of Saponac Pond, a SRSNS.

The Wind Energy Act, 35-A M.R.S. § 3452 (1), provides in pertinent part that:

In making findings regarding the effect of an expedited wind energy development on scenic character and existing uses related to scenic character pursuant to [the Site Law] or [the Natural Resources Protection Act], the [Department] shall determine, in a manner provided in subsection 3, whether the development significantly compromises views from a scenic resource of state or national significance. Except as otherwise provided in subsection 2, determination that a wind energy development fits harmoniously into the existing natural environment in terms of potential effects on scenic character and existing uses related to scenic character is not required for approval under [the Site Law].

M.R.S. 35-A § 3452 (3) provides that:

In making its determination pursuant to subsection 1, and in determining whether an applicant for an expedited wind energy development must provide a visual impact assessment in accordance with subsection 4, the [Department] shall consider:

- (A) The significance of the potentially affected scenic resource of state or national significance;
- (B) The existing character of the surrounding area;
- (C) The expectations of the typical viewer;
- (D) The expedited wind energy development's purpose and the context of the proposed activity;
- (E) The extent, nature and duration of potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource of state or national significance; and
- (F) The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of turbines visible from the scenic resource of state or national significance, the distance from the scenic resource of state or national significance and the effect of prominent features of the development on the landscape.

A finding by the [Department] that the development's generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance. In making its determination under subsection 1, the [Department] shall consider insignificant the effects of portions of the development's generating facilities located more than 8 miles, measured horizontally, from a scenic resource of state or national significance.

M.R.S. 35-A § 3452 (4) provides in pertinent part that:

An applicant for an expedited wind energy development shall provide the [Department] with a visual impact assessment of the development that addresses the evaluation criteria in subsection 3 if the [Department] determines such an assessment is necessary in accordance with subsection 3. There is a rebuttable presumption that a visual impact assessment is not required for those portions of the development's generating facilities that are located more than 3 miles, measured horizontally, from a scenic resource of state or national significance. The [Department] may require a visual impact assessment for portions of the development's generating facilities located more than 3 miles and up to 8

miles from a scenic resource of state or national significance if it finds there is substantial evidence that a visual impact assessment is needed to determine if there is the potential for significant adverse effects on the scenic resource of state or national significance.

Passadumkeag Wind submitted a visual impact assessment (VIA) as part of its application to provide an assessment of the visual impact of the project on all SRSNS within eight miles of the project. Included in the applicant's VIA were summaries of each of the six SRSNS within eight miles of the project, and the applicant's assessment of the project's effect on the scenic character of the SRSNS and the existing uses related to their scenic character. One of the SRSNS within 8 miles of the proposed project, Saponac Pond, has been designated as significant in the "Maine Wildlands Lakes Assessment." Passadumkeag Mountain is south of Saponac Pond and the ridgeline of the mountain runs roughly east to west. The array of fourteen turbines would be on top of the ridge of Passadumkeag Mountain.

To assess the project's scenic impacts to Saponac Pond, the applicant's scenic consultant prepared a photosimulation from the northern shore of Saponac Pond near the boat launch on Route 188. In the description of Saponac Pond the applicant's VIA states, "The most distinctive landform in the vicinity is Passadumkeag Mountain, a broad U-shaped series of ridges to the south that rise over 1,250 feet above the pond." The applicant's VIA describes the existing development around the shoreline as containing approximately 40 camps and homes along the northeastern and northwestern shores of the pond. The applicant's VIA describes Passadumkeag Mountain as being extensively harvested, with clear-cut areas and haul roads visible from Saponac Pond.

Passadumkeag Wind conducted user surveys on portions of an eight-day period during the summer of 2011, and on portions of thirteen days in the summer of 2012. These user surveys show that the respondents had high expectations that the pond would not be crowded and that there would be little development on the pond. Forty-one percent of the respondents in the user survey said the project would impact their enjoyment of the pond. Based on the VIA, the applicant's consultant concluded that the project, with its turbines seen in profile on the ridgeline of Passadumkeag Mountain, and portions of project's access road also visible from the pond, would have an adverse scenic impact on Saponac Pond. Nevertheless, the applicant's consultant concluded that the impact would not be unreasonable since there are relatively few users of the pond, and most of the respondents to the user surveys indicated that they would return to the pond even with turbines in view.

The Department hired David Raphael of Landworks as an independent scenic expert, to assist in its review of the Scenic Character section of the application. In his review of the project, Mr. Raphael conducted a site visit and performed his own analysis of the project's visual impacts on all SRSNS within 8 miles of the project, including Saponac Pond. In his June 19, 2012 report on the project, Mr. Raphael states that the project would have an adverse scenic impact on Saponac Pond and that it would alter the visual quality and sense of place for users and camp owners. His view was that the project's impact would not rise to the level of an unreasonable adverse effect, but he stated that the impact should not be downplayed.

The Department invites public comments and the submission of evidence by any interested person throughout the application review process. The Department holds public meetings, and maintains a copy of the applicant's application materials on the Department's website to allow easy public access to the application materials. In this application process, the Department received input from local landowners, users of the area, and members of the public, many of whom submitted written comments on the application. Throughout the review period for this application, the Department received numerous comments from the public and interested persons stating that Saponac Pond is a regionally significant scenic resource. Comments received from interested persons also stated that Passadumkeag Mountain is a visual feature that greatly accentuates the scenic quality of Saponac Pond.

The appellants argue that because both the applicant's scenic consultant and the Department's scenic consultant concluded that the project would not have an unreasonable adverse impact to Saponac Pond, and since there was no evidence from other experts in the record, the Department erred in its conclusion to the contrary. However the Board notes that it is solely the Department's responsibility to evaluate all the evidence in the record and make a determination of whether a wind energy project meets the applicable standards of the WEA. Here, the Department examined the applicant's application materials, the information and analysis underlying the applicant's VIA conclusion, the Department's scenic consultant's analysis, and the public comments, and conducted its own site visits. The Department is not required to accept the conclusion of its scenic consultant when making its final findings and applying the legal standards to an application.

Both the applicant's visual consultant and David Raphael stated that the project would cause an adverse scenic impact to Saponac Pond. The applicant's scenic consultant concluded, "The survey results, photosimulation, viewshed maps, and roadway plans indicate that the turbines, seen in profile on the ridgeline of Passadumkeag Mountain, and portions of the access road will have an adverse effect on the scenic value of Saponac Pond." In David Raphael's review he stated that Saponac Pond would be adversely impacted by the proposed project due to its proximity to the project site and the fact that there would be visibility of the project from nearly all of the surface area and shoreline of the pond (other than the southern shoreline). Mr. Raphael's assessment was that, given the horizontal extent of the project, there would be up to 62 degrees of view of turbines from portions of the pond. He stated that the project would dominate the views from the pond and the project would add a distinct, unnatural form to the mountain landscape.

In its July 5, 2012, draft staff analysis, the Department provided a summary of the project and its analysis as of that date, which related a mixture of factors concerning the impacts on Saponic Pond but which leaned towards a positive finding. The draft staff analysis obviously was not intended to be the Department's final decision on the license as the evidentiary record was still open and further information and analysis of the impacts on Saponic Pond resulted in the Department's finding as reflected in the Department's decision.

The record reflects that a second public meeting was held on July 12, 2012, presided over by the Commissioner and other Department staff. On July 12, prior to the public meeting, the Commissioner and Department staff took the opportunity to view Saponac Pond, Nicatous Lake, and an area near the Rollins Wind project. Observations were made from near the boat launch on Route 188 on Saponac Pond, where one of the applicant's photosimulations was produced. From this location, the turbines would be located at a distance of 4.0 to 4.8 miles. Department staff observed that, from the location near the boat launch on Route 188, the viewshed toward Passadumkeag Mountain did not include many existing structures or other development; Passadumkeag Mountain dominated the view due to its prominence above Saponac Pond; and there were no other similar mountain or ridge features visible from that location. Subsequent to this site inspection, the Department requested that the applicant provide an additional photosimulation made from near the southern shore of Saponac Pond which would be representative of views of users of the pond. Department staff also conducted a site visit to Saponac Pond on September 6, 2012. During this visit a boat was used to gain access to various viewpoints around the pond, the applicant's submissions were consulted, and photographs were taken by Department staff for the record. The Department staff observed, and the photographs reflect, that turbines from the Rollins Wind project are visible from Saponac Pond looking towards the north.

On October 29, 2012, Passadumkeag Wind submitted two memoranda with information supporting its contention that the project would not cause an unreasonable adverse effect on Saponac Pond. The first memorandum compared the proposed project to two other previously permitted projects in terms of scenic impact. The second memorandum was a proposal to reduce by one the number of turbines in the project. The Department declined to evaluate the proposal to amend the proposed project by reducing the number of turbines due to the fact that revisions to the proposal had been invited in August and this proposed revision was submitted when the statutory time frame for issuing a decision was only ten days away.

The Board has considered the October 29, 2012 memorandum which dealt with the two existing permitted projects, however each project must be evaluated on its own merits. The Board finds that the scenic impacts of one wind energy project are difficult to compare with the scenic impacts of a different project. The array of turbines is very different, the number of turbines visible from the resource at issue is different and the extent to which each turbine is visible varies as well. The size and nature of the SRSNS, the resource at issue varies, and unique topography surrounds each project and each resource. In addition, the amount of existing development in the applicable viewshed, the location of that development within the viewshed, and the nature of the users and their expectations would vary. Most fundamentally, the Department and the Board must decide each application based on the evidence in the record pertaining to that application. For these reasons the Board finds that the comparison of the Department's assessment of the visual impacts of different wind energy projects is of limited value in the analysis of this application.

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As part of its analysis of this project's scenic impacts to Saponac Pond, the SRSNS at issue in this appeal, the Board has considered the six statutory criteria listed in 35-A M.R.S. § 3452(3). The Board makes the following factual findings with regard to the proposed project's effects on the scenic character and existing uses related to scenic character of Saponac Pond, based on the WEA's six criteria:

- (a) Significance of the SRSNS: Saponac Pond is a valued and regionally significant scenic resource based on its boating, fishing and recreational uses. It is distinctive for its views of Passadumkeag Mountain in an area that does not have many comparable views.
- (b) Existing character of the surrounding area: Despite some existing development on the northern side of Saponac Pond, the views from the pond toward Passadumkeag Mountain are undeveloped. The project would result in a significant change to the existing character of Saponac Pond.
- (c) User expectations: Most respondents to the user surveys indicated they expect Saponac Pond to be uncrowded and undeveloped. The construction of the project would have a substantial effect on those expectations, since the project would dramatically change the level of development as viewed from the Saponac Pond.
- (d) Project purpose and context: The project purpose is to generate electricity through the construction of turbines on Passadumkeag Mountain. The context or setting of the area around the proposed project is that of a mostly undeveloped mountain that dominates the view from Saponac Pond.
- (e) Nature of uses and effects on public use and enjoyment: The number of people using a scenic resource should not be a determinative factor here because most of the respondents to the user surveys stated that they expect Saponac Pond to be uncrowded and undeveloped. The Board notes that the 41% of the users that stated that their enjoyment would be negatively impacted should the project be constructed. This is an unacceptable effect on public use and enjoyment of this SRSNS.
- (f) Scope and scale: A majority of the turbines would be visible from 97% of Saponac Pond; the turbines would be as close as 2.5 miles; and the extent of the view would range from 52 degrees to 62 degrees of the total panorama. Passadumkeag Mountain is the dominant visual feature as viewed from Saponac Pond, and the proposed project would span the entire ridge line of Passadumkeag Mountain causing an unreasonable adverse effect to the scenic character of Saponac Pond.

Based on percentage of the horizon occupied by the project; the dominance of the view of Passadumkeag Mountain from Saponac Pond; the number of turbines visible from Saponac Pond; and the impacts to the use and enjoyment of Saponac Pond, the Board concludes that the project would significantly compromise views from Saponac Pond and would have an unreasonable adverse effect on the scenic character of Saponac Pond and existing uses of the pond related to scenic character.

B. INTERPRETATION OF THE STANDARD:

The appellants argue that Department applied incorrect legal standards when evaluating the visual impacts of the proposed project on Saponac Pond. In their appeals, the appellants contend that the Department failed to apply the scenic impact standards from the WEA and instead applied the Site Law and the NRPA standards or an incorrect combination thereof. They argue that the WEA standards are to be applied instead of the general Site Law and NRPA standards; that the Department's conclusion that the proposed project would cause an unreasonable adverse effect on the scenic character of an SNRNS was the result of a misapplication of the legal standard, and that thereby, the application should not have been denied.

To obtain a Site Law and an NRPA permit for the proposed development, Passadumkeag Wind must meet the criteria set forth in the Site Law and the NRPA. The scenic and aesthetic impacts criteria of both statutes are further specified, and narrowed, for applications meeting the definition of an expedited wind energy development. The Wind Energy Act (M.R.S. 35-A § 3452 (1)) directs that "In making findings regarding the effect of an expedited wind energy development on scenic character and existing uses related to scenic character pursuant to [the Site Law or the NRPA] the [Department] shall determine, in the manner provided in subsection 3, whether the development significantly compromises views from a scenic resource of state or national significance such that the development has an unreasonable adverse effect on the scenic character or existing uses related to scenic character of the scenic resource of state or national significance." With this language the Department is directed to use the more specific analysis of the WEA in cases of an expedited wind energy project in order to determine whether the underlying general standards of the Site Law and the NRPA are met and a permit under those laws may be issued. The Site Law's basic scenic impact criterion requires a showing that a developer of a proposed project has made adequate provision for fitting the development harmoniously into the natural environment and that the development would not adversely affect existing uses and scenic character. The appellants are correct in their argument that generating facilities of an expedited wind energy development (which includes the turbines), and in this instance also the associated facilities, are not required to meet the first part of the Site Law's general criterion standard, a determination that the project would fit harmoniously into the existing natural environment. The WEA states that a "determination that a wind energy development fits harmoniously into the natural environment in terms of potential effects on scenic character and existing uses related to scenic character is not required for approval" under the Site Law. Thus this first aspect of the Site Law criterion is waived for expedited wind energy projects, however the general Site Law requirement that the development not adversely affect existing uses or scenic character is not set aside by the WEA, nor is the standard under the NRPA.

The Board concludes that the Department erred in requiring that the applicant make adequate provision for fitting the development harmoniously into the existing natural environment.² The Department's other conclusion, that the proposed development would have an unreasonable adverse effect on the existing uses and scenic character of Saponac Pond, is an appropriate application of the law as directed by the legislature in both the Site Law and the WEA. That conclusion is supported by the finding that the proposed activity would significantly compromise views from a SRSNS, and it is the appropriate legal basis for the denial of the application.

The appellants further argue that the Department improperly based its conclusion that the project would have an unreasonable adverse impact on the turbines' high visibility. The WEA provides that:

A finding by the [Department] that the development's generating facilities are a highly visible feature in the landscape is not a **solely** sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance. M.R.S. 35-A § 3452 (3) (emphasis added)

The Department specifically stated in its November 9, 2012 Order that the determination of an unreasonable adverse effect on the scenic character of Saponac Pond was not based solely on a finding that the generating facilities are a highly visible feature in the landscape. Rather, the Department concluded that the resource's significance to its users, the predominant role of the mountain in the value of the scenic resource, the expectations of the viewers, and the nature of the affected uses formed the basis of the finding of an unreasonable adverse impact. The Board concludes that the WEA allows the consideration of whether generating facilities would be a highly visible feature in the landscape as long as that factor is not the only basis for a negative finding with regard to scenic impacts. Both the Department's determination and the Board's determination of unreasonable adverse effects are based on multiple factors.

Passadumkeag Wind contends in its appeal that the Department should not have required the turbine portion of the proposed project to meet the NRPA scenic impact standard. Its argument is that only the transmission line portion of the project affects wetlands and that portion of the project would not be visible from Saponac Pond. The Board finds that when a project is subject to the NRPA by virtue of its impacts to, or being adjacent to, a protected natural resource such as a freshwater wetland, the project as a whole must meet the licensing criteria. To apply the NRPA otherwise would lead to a result inconsistent with the intent of the statute, such as the assessment of the impacts of only one half of a proposed project. The

² The Department's error in applying this provision of the Site Law appears both in its negative conclusion with regard to the generating facilities and its positive conclusion with regard to the associated facilities. The Board finds the associated facilities of the proposed project would not adversely affect existing uses or scenic character in the municipality, neighboring municipalities or townships.

Board concludes that the NRPA applies to the proposed development as one complete project.

7. PROCEDURAL ARGUMENTS:

While the Cupraks did not appeal the Commissioner's decision, they did submit a response to the appeal making the arguments they submitted during the application's review that the project should not be considered an expedited wind energy project. The Cupraks did not appeal the denial of the application but the Board concludes that this project does qualify as an expedited wind energy project and the application was appropriately processed in accordance with the WEA.

The appellants contend that the Department denied their due process rights by merging the standards pertaining to visual impacts from the WEA, the Site Law, and the NRPA after the July 12, 2012 public meeting, creating a new standard without notice to the appellants. The appellants argue that the inclusion of consideration of whether a project fits harmoniously into the natural environment was an error by the Department and contrary to the WEA. As discussed in section 6(B) above, the Board finds that the Department's use of the harmonious fit standard from the Site Law was in error and inconsistent with the directive of the WEA. However, the Department's analysis under the remainder of the Site Law's scenic impact criterion and the NRPA criterion as specified under the WEA was appropriately done.

Penobscot Forest also argues that the process used by the Department here, of having a second public meeting chaired by the Commissioner, did not accord them due process because other expedited wind energy project applications were only the subject of one public meeting. The record reflects that in August of 2011, the Commissioner initiated a policy to increase public input in the processing of expedited wind energy project applications. The Commissioner determined that two public meetings would be held on all wind energy project applications received after September 5, 2011 and that Department staff would issue a draft staff analysis between the two public meetings. The second meeting would be chaired by either the Commissioner or the Deputy Commissioner. The Board finds that this process, which was adopted before the application was filed and which is designed to further public input, did not violate the appellants' due process rights.

The appellants also argue that the Department did not allow the modification to the proposed project design or adequately review the supplemental information submitted by them, thus denying them due process.

The record reflects that on July 27, 2012, Department staff contacted the applicant and informed them that the Department was considering a denial of the project application. Department staff held a meeting on August 1, 2012 with Passadumkeag Wind and Penobscot Forest to discuss its concerns with the proposed project, and offered the applicant an opportunity to address the Department's concerns with supplemental information including a

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photosimulation from an area near the southern shore of Saponic Pond that would have the most visibility of the project, or potential project modifications. At the Department's suggestion, the applicant asked that the application be placed on hold while the applicant reviewed the Department's concerns. The Department offered to meet again with the applicant within a few weeks of the August 1 meeting so as to review supplemental information or potential project modifications with the Department. The applicant did not avail itself of that additional meeting with the Department, instead choosing to submit supplemental VIA information on September 26, 2012.

The applicant's September 26 supplemental VIA submission did not include the photo-simulation from Saponac Pond requested by the Department. It did include a 360-degree movie simulation from a location on Saponac Pond about three miles away from the turbines. From this location on Saponac Pond, all 14 turbines would be visible, with a horizontal angle of view of approximately 62 degrees. This movie simulation confirmed Department staff's observations from the July 12, 2012 site visit of Saponac Pond that all the project turbines would be visible from the majority of Saponac Pond; that the horizontal view angle of the turbines would be greater on the pond than from the boat launch on Route 188; and that very little development is visible from Saponac Pond looking toward Passadumkeag Mountain.

On the afternoon of November 8, 2012, one day before the Department's statutory deadline to decide the application, the applicant submitted a peer reviewed study entitled, "Baskahegan Lake User Surveys" prepared by Kleinschmidt for First Wind. This study surveyed the users of Baskahegan Lake, which has views of the Stetson Mountain Wind project, after that project was constructed. Due to time constraints a review of this study could not be completed prior to the issuance of the Commissioner's decision on the Passadumkeag Wind project. However, in the context of this appeal and subsequent to the issuance of the denial of the Passadumkeag Wind application, Department staff reviewed this study. DEP staff concluded that, similar to trying to compare the visual impacts from one project to another, comparing the uses of different scenic resources that have visibility of different wind projects has limited value. The Board concurs, and finds that the Baskahegan Lake User Survey has little relevancy to this project.

The Board finds that both appellants had ample opportunity to submit evidence into the record and respond to the Department's expressed concerns about the proposed project. The Board finds the processing of the application was consistent with the Department's rules and that the procedure followed accorded due process to both appellants.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.
2. The Department erred in its application of the Site Law requirement that a developer make adequate provision for fitting the proposed development harmoniously into the existing natural environment.

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3. The Department's application of the Wind Energy Act standards to assess whether the other required licensing standard of the Site Law pertaining to existing uses and scenic character (38 M.R.S. §484(3)), and the existing uses standard of the Natural Resources Protection Act (38 M.R.S. §480-D(1)) were met was otherwise correct.
4. The applicant's proposal to construct a 42 MW, fourteen turbine wind energy development, known as Passadumkeag Wind Park, would have an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance.

THEREFORE, the Board MODIFIES BUT AFFIRMS Department Order #L-25597-24-A-N/L-25597-TH-B-N, dated November 9, 2012 denying the application of PASSADUMKEAG WIND PARK, LLC to construct PASSADUMKEAG WIND PARK in Grand Falls Township, Summit Mountain Township, Greenfield Township and Greenbush, Maine and DENIES the appeals of Passadumkeag Wind Park, LLC and Penobscot Forest, LLC.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2013.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Robert A. Foley, Chair